THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed on April 15, 1931, and is found at pages 176 to 180 of the Record. The opinion is officially reported in *49 Fed. (2nd) 158.* No additional opinion was handed down with the order denying the rehearing.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT.

As the writ of certiorari was applied for and granted upon authority of Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936, and as the right of this court to review by certiorari the questions herein presented is clearly given by the Federal statutes referred to, no cases are cited to support such right.

SUMMARY OF THE CASE.

I. This was an action at law instituted by respondent against petitioner upon a fire insurance policy in the amount of $4000.00 which insured respondent's three-story brick business building located on Main Street in the City of Wheeling, West Virginia. The insured building was damaged by fire on the evening of December 27, 1925. The respondent instituted suit upon her policy and obtained a judgment in the District Court of the United States for the Northern District of West Virginia for the sum of $4591.84; and the Circuit Court of Appeals for the Fourth Circuit, *with one of the three Judges dissenting,* affirmed this judgment on April 15, 1931. Petitioner's application for a rehearing was denied on June 29, 1931.

II. The important question before the Circuit Court of Appeals, raised by petitioner's exceptions to the District Court's charge to the jury, and decided adversely to petitioner by a divided court, may be stated as follows:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a warranty providing for a forfeiture of the policy if gasoline or other dangerous articles are kept or used on the insured premises) a "rider" or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building as fuel for the operation of a tenant's moonshine stills, without forfeiting the policy?*

III. The facts which give rise to the foregoing question in the present case may be summarized, in topical form and in chronological order, as follows:

(1) *The material provisions of the insurance policy as originally issued.*

Under date of February 14, 1924, petitioner issued to respondent a policy of fire insurance for $4000.00, in the standard form prescribed for use in West Virginia by statute (Laws of West Virginia of 1923, Chap. 18). The insured building was described in the so-called "Occupancy Clause" of the policy in the language following:

"$4,000.00 On four story brick building, with

approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*"

(R. 5). (Italics ours).

The policy also contained a paragraph bearing the heading "Privileges Granted", which included a provision commonly known (and hereinafter so referred to) as the "Work and Materials Clause", as follows:

"And for present and other occupancies not more hazardous, and to do such work and to keep and use such materials as are usual in such occupancies." (R. 3).

The opinion of the Circuit Court of Appeals (R. 179) indicates that it may have been under the impression that this Work and Materials Clause was not embraced in the original policy, but was added later at the same time as the "rider" hereinafter referred to. If so, the assumption was incorrect, for the Record clearly shows that the "Privileges Granted" paragraph, which includes the Work and Materials Clause, was incorporated in the policy from its inception, and no change whatsoever was made therein when the "rider" was attached in April, 1925. In preparing the Transcript of the Record, the District Clerk, to avoid repetition, only copied once into his transcript the paragraph headed "Privileges Granted" (R. 3), but his cross-reference at page 5 of the Record shows that no change was made in this paragraph at the time of the attachment of the "rider".

The scope, intent and meaning of the Work and Materials Clause quoted above, so far as it relates to gasoline and other prohibited articles, are clearly and specifically explained by the following provision contained in the Handbook of Rules of the West Virginia Fire Underwriters Association filed in the office of the Insurance Commissioner of West Virginia:

"It is understood that the word 'materials' as used above, *includes gasoline* and such other materials as are prohibited by the printed conditions of the policy, *when kept and used for such purposes as are usual to the occupancies permitted.*" (R. 89). (Italics ours).

It is conceded that the foregoing provision should be treated as a part of the insurance contract; the respondent introduced the Handbook of Rules in evidence at the trial upon this theory (R. 89), and both the District Court and the Circuit Court of Appeals (see R. 179) adopted this view.

Among the provisions contained in respondent's policy were the following two standard warranties in the exact form prescribed by the West Virginia standard policy statute referred to above (Laws of West Virginia of 1923, Chap. 18):

(a) A warranty generally known as the *"Prohibited Articles Warranty"*, in the language following:

"Unless otherwise provided by agreement in writing added hereto *this Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises;* fireworks, greek fire, phosphorus, explosives, benzine, *gasoline*, naphtha or any other petroleum product of greater inflammability than kerosense oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. 6-7). (Italics ours).

(b) A warranty generally known as the *"Increase of Hazard Warranty"*, as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured." (R. 6-7).

At the time the policy was issued to respondent in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by Charles F. Bachmann, respondent's husband. It is conceded that throughout the period of time involved in this case, Charles F. Bachmann looked after the insured building as respondent's agent (R. 31).

(2) *The "rider" or "permit" added to the policy.*

About April, 1925, the clause describing the occupancy of the insured building was amended by the attachment of a so-called "rider", which was in the language following:

> "$4000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. 3). (Italics ours).

This "rider", which the Circuit Court of Appeals held was equivalent to a general gasoline "permit" (see R. 179) made no change or amendment whatsoever in the provisions of the policy, either by addition or subtraction, (the "Privileges Granted" paragraph in the "rider" being precisely the same as in the original policy, R. 3, 5) except to substitute for the words "occupied as Produce Store" the words "occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous". This is obvious from the follow-

ing comparison of the original Occupancy Clause in the policy and the description of the occupancy of the building contained in the "rider":

Original Occupancy Clause:	*Occupancy Clause as amended by Rider:*
"$4000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*" (R. 5). (Italics ours).	"$4000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. 3). (Italics ours).

Hence, after the addition of the "rider", the provisions of respondent's policy pertaining to the storage or use of *gasoline* in the insured building were the following (we quote here, in sequence, the Prohibited Articles Warranty, the Occupancy Clause as amended by the "rider", the Work and Materials Clause, and the provision from the Handbook of Rules):

> "Unless otherwise provided by agreement in writing added hereto, *this Company shall not be liable for loss or damage occurring* * * * (d) * * * *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises* * * * *gasoline* * * *". (R. 6, 7).
>
> "$4000.00 on three story brick building * * * *occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous.*" (R. 3).
>
> "And for present and other occupancies not more hazardous and *to do such work and to keep*

and use such materials as are usual in such occupancies". (R. 3).

"It is understood that the word 'materials' as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, *when kept and used for such purposes as are usual to the occupancies permitted."* (R. 89). (Italics ours).

Combining and condensing the provisions just quoted, we submit that the net result is the following:

"The policy will be forfeited if gasoline is kept, used, or allowed on the insured premises; provided, however, that such forfeiture shall not occur if gasoline be kept and used for such purposes as are usual to the following permitted occupancies: bottling Automobile Oils, Offices, or other *Mercantile* purposes not more hazardous."

We do not understand that the respondent questions the correctness of the foregoing condensation of the so-called gasoline "permit", except in one particular. She argues that the adjective *"Mercantile"* should be eliminated entirely from the last phrase of the "permit", so that instead of "for other *Mercantile* purposes not more hazardous", it would read "for other purposes not more hazardous". As we shall see later in the Argument, it is entirely immaterial, in so far as the questions presented on this review are concerned, whether the adjective "Mercantile" be included in the "permit" or not.

(8) *Circumstances surrounding attachment of "rider".*

In the Spring of 1925, before the "rider" was added, the insured building was leased to one Huff, who occupied the premises until November 1, 1925, and conducted therein during that period a business involving the

manufacture of automobile oils (R. 125-6). Shortly after Huff leased the building, it was suggested to respondent by her son, Carl G. Bachmann, who is of respondent's counsel in the present case, that as the building was being used for a purpose different from that specified in the Occupancy Clause of the policy, it would be advisable to have a rider attached to take care of this situation. In explanation of the circumstances under which the "rider" was added to the policy, Carl G. Bachmann testified at the trial as follows:

> "While Huff was in the Main Street building making the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business." (R. 131).

Thereupon, at the request of the Bachmanns, petitioner's agent visited the building. The tenant Huff, called as a witness for the respondent, testified as follows regarding the visit of the petitioner's representative:

> "I was present at the building when the representatives of the different insurance companies came down and inspected the business for the pur-

pose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman, and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rock along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflammability. Based upon this information, we were instructed to put dripping pans under each spigot on the drums, and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this." (R. 125-6).

Other testimony in the case confirmed the fact that petitioner's agent, at the time of his inspection, gave detailed instructions as to the safety precautions to be taken in the storing of the materials used in Huff's business (R. 103).

Following the visit of petitioner's agent to the premises, the "rider" amending the Occupancy Clause of the policy was added, *but no other change or amendment whatsoever was made in the policy.*

The evidence shows that Huff used "some gasoline" (R. 125) in his manufacturing process, but it was em-

ployed as an ingredient, and not as fuel. According to the testimony of Huff, he used the gasoline "as a driver in the penetrating oil, to cut rust" (R. 130). Huff used natural gas as fuel (R. 129).

(4) *Occupancy of Bachmann Building at time of fire.*

It is conceded that the tenant Huff vacated the Bachmann Building on November 1, 1925 (R. 126-7), two months prior to the fire, which occurred on December 27, 1925. On November 1, 1925, the Bachmann Building was leased for a term of eighteen months to one "Bill Varisca", an Italian, who was a complete stranger to the Bachmanns (R. 35). Varisca stated that he intended to use the building for a wholesale grocery business, but at the time of the fire the building was supposedly empty and not in use, (R. 39). However, Varisca was in possession of the building, and as he had the only keys, no one else had access to it (R. 37, 39).

(5) *Moonshine stills and gasoline found in ruins of building.*

On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living nearby (R. 48-9), the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero (R. 48). The water thrown upon the burning building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills,* of about 150 gallons capacity each (R. 57, 59, 61-70). The three

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

INTRODUCTORY STATEMENT.

This case is before the court upon a writ of certiorari to the judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, which on April 15, 1931, affirmed, by a divided court, a judgment rendered by the United States District Court for the Northern District of West Virginia in favor of Sophia C. Bachmann (hereinafter referred to as "respondent") against the St. Paul Fire & Marine Insurance Company, a corporation, (hereinafter referred to as "petitioner") in an action at law upon a fire insurance policy. The Circuit Court of Appeals denied a rehearing to the petitioner by order entered on June 29, 1931. Petitioner's application for a writ of certiorari was granted by this court on October 26, 1931.

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the premises, even though such article be kept without knowledge or control of the lessor (see, for example; *Liverpool & London & Globe Insurance Co. v. Gunther*, 116 U. S. 113; *Miller v. Union Assurance Society*, 39 Fed. (2nd) 25; *Leonard v. Northwestern Insurance Co.*, 290 Fed. 318; *Bias v. Globe & Rutgers Co.*, 85 W. Va. 134, at page 138, and *Westchester Fire Insurance Co. v. Ocean View Co.*, 106 Va. 633), respondent elected to rely upon the "rider" attached to her policy in April, 1925, respondent's contention being that this was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty.

(b) That the presence and operation of the moonshine stills in the insured building (irrespective of whether gasoline was used in connection therewith) constituted an increase of the fire hazard to the premises in violation of the Increase of Hazard Warranty. To establish a breach of this warranty, of course, it was admittedly incumbent upon the petitioner to show that the increased hazard was, "within the control or knowledge of the insured" (R. 7). Substantial evidence was offered at the trial tending to show that Charles F. Bachmann, respondent's admitted agent, knew before the fire that the tenant Varisca had the stills in the building. This issue was submitted to the jury, and the jury resolved the question in favor of the respondent. In the Circuit Court of Appeals, petitioner complained that the District Court's charge did not correctly submit this issue to the jury. However, since it is believed that this case turns upon the District Court's charge with respect to the Prohibited Articles Warranty, we shall not add to the length of this brief by any further discussion of the trial court's charge under the Increase of Hazard Warranty.

(7) *The District Court's charge on the Prohibited Articles Warranty.*

The District Court adopted *in toto* respondent's theory that the "rider" was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. This appears in the charge in two different aspects:

(a) The District Court ruled that the petitioner was "estopped", on account of the "rider", from relying on its defense that the Prohibited Articles Warranty had been violated by the presence and use of gasoline on the premises. We quote the pertinent part of the District Court's charge on this point:

> "You are also charged by the court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. 146). Italics ours).

(b) Throughout its charge, the District Court ruled that the keeping or use of gasoline in the building would not forfeit the policy, in any event, unless shown to be "within the control or knowledge" of the respondent or her agent—which was, of course, merely another way of saying that in so far as *gasoline* was concerned, petitioner was not entitled to rely on the

strict provisions of the Prohibited Articles Warranty, but must confine its defense to the Increase of Hazard Warranty. The following extracts from the District Court's charge are typical:

"PLAINTIFF'S INSTRUCTION NO. 2.

The jury are further charged by the Court that under the second Assignment of Grounds of Defense, the said defendant Insurance Company must prove by a preponderance of the evidence that at the time of the fire complained of and prior thereto large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises and that such keeping, using and allowing of gasoline was well known to the plaintiff, Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, and unless the said defendant has proven by a preponderance of the evidence the presence of gasoline, explosives, mash and other highly combustible substances upon said premises at and before the time of the fire *and has also proven by a preponderance of the evidence that such keeping, using and allowing was well known to the plaintiff Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, such keeping, using and allowing of gasoline on said premises constitutes no defense for the defendant Company in this action.*" (R. 142-3). (Italics ours).

"PLAINTIFF'S INSTRUCTION NO. 4.

The jury are charged by the Court that even though you may believe from the evidence that at and prior to the time of the fire complained of quantities of gasoline were kept or used upon the premises described in the policies of insurance *either for the operation of stills or for any other*

purpose and even though you may believe that at the time of the fire in question, stills were actually being operated upon the premises destroyed by fire, yet the Court charges you that such keeping and using of gasoline and such operation of stills that if neither the said plaintiff, Sophia C. Bachmann, nor her agent, the said Charles F. Bachmann, had any knowledge or control of such keeping and using of gasoline or such operation of stills, such keeping, using and operation will not invalidate the insurance policy issued by the defendant and sued on in this case. *That is to say that unless the plaintiff, Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation under such circumstances constitute no defense for the defendant Company."* (R. 144) (Italics ours).

"PLAINTIFF'S INSTRUCTION NO. 10.

To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that *the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca and/or his associates* and if on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the

plaintiff, Sophia C. Bachmann." (R. 147). (Italics ours).

Proper exceptions were taken and noted upon the record by petitioner with respect to all of these features in the charge to the jury (R. 154-6). Also, the petitioner specifically requested the District Court to embody in its charge instructions to the jury to the effect that it was not necessary for petitioner to prove that the keeping or use of gasoline in the insured building by the tenant was within the control or knowledge of the respondent or her agent (R. 148-150); but the District Court refused the requested instructions, and petitioner has preserved appropriate exceptions thereto. (R. 157).

It is apparent, therefore, that by the District Court's charge, only one question of fact was actually submitted to the jury—namely, whether or not the respondent or her agent had any "control or knowledge" of the moonshine stills or gasoline found in the Bachmann Building. The portion of the charge embodying Plaintiff's Instruction No. 10 quoted above, which purports to "sum up and state briefly and concisely the law applicable to the main issues in this case" (R. 147) plainly shows how the District Court narrowed down the issue of fact, so that the jury had no alternative except to return a verdict for the plaintiff, if it believed that neither the respondent nor her agent had any "control or knowledge" of the manner in which the insured building was being used by the tenant Varisca. In other words, the District Court confined the petitioner's defense entirely to the Increase of Hazard Warranty; the Prohibited Articles Warranty, with its stricter provisions, was ruled out of the case.

Upon the narrow issue thus submitted to it, the jury returned a verdict for the respondent, upon which,

after overruling petitioner's motion for a new trial, the District Court entered judgment (R. 20).

(8) *The decision of the Circuit Court of Appeals.*

Upon the appeal, the Circuit Court of Appeals for the Fourth Circuit (WATKINS, *District Judge, dissenting*) affirmed the judgment below, holding that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon the attachment of the "rider". We quote from the majority opinion of the Circuit Court of Appeals:

> *"At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, *the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent."* (R. 179-180). (Italics ours).

The judgment of the District Court was affirmed by the Circuit Court of Appeals on April 15, 1931, (R. 180). On May 5, 1931, petitioner filed a petition for rehearing. An order denying a rehearing was entered by the Circuit Court of Appeals on June 29, 1931, (R. 181-2). The writ of certiorari was granted by this Court on October 26, 1931 (R. 182).

SPECIFICATION OF ERRORS TO BE URGED.

The petitioner assigns as error the same matters which were urged in support of the application for certiorari. Stated in slightly different language, the petitioner's assignments of error are as follows:

I. *The Circuit Court of Appeals erred in approving the District Court's charge to the jury to the effect that the "rider" attached to respondent's policy eliminated gasoline entirely from the Prohibited Articles Warranty, so that any gasoline kept or used on the insured premises must be proven to be "within the control or knowledge" of the respondent or her agent in order to work a forfeiture of the policy.* This ruling by the majority of the Circuit Court of Appeals was erroneous, because:

(1) *The decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, *and Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110.

(2) *In applying the rule of strict construction to respondent's insurance policy and the "rider" thereon, wherein the language was "clear and unambiguous," the decision of the Circuit Court of Appeals is in conflict with Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, *and United States Fidelity & Guaranty Co. v. Guenther,* 281 U. S. 34.

(3) *Aside from the decisions of this Court, the interpretation given to respondent's policy and the "rider" thereon is contrary to well-settled principles of construction, as reflected by various Federal and State Court decisions construing similar "permits" on fire insurance policies.*

II. *The Circuit Court of Appeals erred in affirming the action of the District Court in refusing to charge the jury, at petitioner's request, that if at the time of the fire gasoline was being kept, used or allowed in the Bachmann Building by the tenant Varisca for the purpose of operating his moonshine stills, the policy was forfeited, whether or not the respondent had "control or knowledge" thereof.*

Since this assignment of error involves precisely the same questions of fact and law as I above, everything that is said in the Argument, *post*, applies equally to both assignments.

SUMMARY OF THE ARGUMENT.

I.

In the absence of the "rider" or "permit", the storage or use of gasoline in the Bachmann Building by the tenant Varisca would unquestionably have forfeited the policy under the Prohibited Articles Warranty, irrespective of whether the respondent had "control or knowledge" thereof.

The Prohibited Articles Warranty and the Increase of Hazard Warranty are entirely separate and distinct, and their provisions must not be confused:

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452;

Norwaysz v. Thuringia Insurance Co., 204 Ill. 334.

Under the Prohibited Articles Warranty, the storage or use of a prohibited article, such as gasoline, in an insured building by a tenant forfeits the policy; it is not necessary for the insurance company to prove, as it must in any defense raised under the Increase of Hazard Warranty, that the owner of the building had "control or knowledge" of the tenant's acts:

Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113;

Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110;

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Bias v. Globe & Rutgers Co., 85 W. Va. 134, at 138.

And see the many other authorities for this proposition cited in the Argument.

II.

Neither the language of the "rider" or "permit", nor the circumstances under which it was added to respondent's policy, admit of its construction as a general gasoline "permit", allowing gasoline to be used for the operation of moonshine stills.

When all of the provisions of respondent's policy which pertain to the storage or use of gasoline in the insured building, including the "rider" added to respondent's policy in April, 1925, are read and fitted together, the net result is merely a "permit" to use gasoline for the following purposes:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile* purposes not more hazardous.

It is conceded that the "rider" was added to the policy while a former tenant was bottling automobile oils in the insured building, and that it was never contemplated by the parties at that time that the building would be used for the manufacture of moonshine liquor with large stills operated by gasoline. The circumstances surrounding the attachment of the "rider" to the policy, therefore, do not support its interpretation as such a general gasoline "permit" as would allow a subsequent tenant to use gasoline as fuel to operate his moonshine stills.

Furthermore, the plain written provisions of the Prohibited Articles Warranty and the "rider" or "permit" must necessarily determine their scope and effect, and the extent to which gasoline might be used on the premises; the written warranties and conditions of the policy can not be modified, amended, eliminated, or waived by parol:

stills were all designed for operation by *gasoline;* that is, the boilers of the stills sat upon hot plates the burners of which were fed with gasoline from three large compressor tanks attached thereto. When chopped out of the ice after the fire, two of the compressor tanks *contained large quantities of gasoline* (R. 57, 62, 63). The third compressor tank had apparently exploded (R. 57, 63). A number of five-gallon cans *containing gasoline* were also found at various places in the Bachmann Building (R. 57, 58, 62, [illegible], 68, 71, 72, 131, 132). Large quantities of moonshine mash, corn sugar, and rye grain were also found in the building by the officers.

The witness Doerr (a Federal Prohibition Officer) explained the method by which the gasoline was used as fuel to heat the stills as follows:

> "The still was upon a hot-plate, operated by a gasoline compressing tank, or rather fed from a gasoline compressor tank. The method of operation of such a gasoline compressing tank is about as follows: The gasoline is placed in the gasoline compressing tank. The tank is then filled with air from a pump, an air-pump something like an automobile pump, which is attached to the tank. There is a gauge on the gasoline tank, and also a valve and a connection with a small lead pipe leading fr[illegible]n the gasoline pipe to the burner under the still, a[illegible] in that way the compressing tank will feed the fuel to the burner in an even manner. The gasoline goes to the burner under the pressure made possible by the air pump into the gasoline tank." (R. 57).

The witnesses Prince and Morris testified to the same effect (R. 64, 80). Morris, a Professor of Chemistry at West Virginia University, testified that the compressor tanks found in the Bachmann Building were

designed for use with gasoline (R. 80), and he also pointed out the dangers incident to such use in connection with a distillation process (R. 81). While the respondent produced at the trial a number of witnesses who had visited the building during and after the fire, and who testified, in substance and effect, that they "did not see any gasoline in the building", the overwhelming weight of the evidence, based upon the direct and positive testimony of the officers who found the moonshine stills and other articles, establishes the fact that large quantities of gasoline were being kept and used on the insured premises as fuel for heating the stills. One of the officers later used some of the gasoline found in the building to operate his automobile (R. 65, 68). However, it is not necessary to argue this factual question, because both the District Court and the Circuit Court of Appeals found that there was sufficient evidence to require its submission to the jury.

As soon as the moonshine stills were discovered, both the officers and Charles F. Bachmann, respondent's agent, (see R. 133) made diligent search for the Italian tenant Varisca. However, Varisca made good his escape and has never yet been apprehended.

(6) *The issues raised in the trial court.*

The following two issues were raised by the pleadings and evidence at the trial in the District Court:

(a) That the keeping and using of gasoline in the insured building, for the operation of the tenant's moonshine stills, constituted *a clear violation of the Prohibited Articles Warranty* in the policy, irrespective of whether the respondent or her agent had any "control or knowledge" of the tenant's acts. Realizing full well that the lessor of an insured building must assume responsibility for the keeping of a prohibited article upon

Northern Assurance Co. v Grand View Building Assn., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

III.

The use being made of gasoline in the Bachmann Building at the time of the fire was clearly not within the terms of the "permit".

When the fire occurred, the gasoline in the Bachmann Building was being used by the tenant Varisca to operate his three large moonshine stills. This was clearly not a *"Mercantile"* purpose, nor was it a purpose *"not more hazardous"*. The operation of a moonshine still plant in an insured building is held by the courts to be a "more hazardous" occupancy of the premises *as a matter of law*:—

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;
Taverna v. Palatine Insurance Co., 238 N. Y. S. 389;
Schaffer v. Hampton Insurance Co., 235 N. W. 618, and 236 N. W. 327, (Minn.);
Whitlatch v. Mutual Fire Insurance Co., decided by Supreme Court of Appeals of West Virginia on Oct. 13, 1931 (see *Appendix A*).

IV.

The use of gasoline to operate moonshine stills not being within the terms of the "permit" on respondent's policy, the decision of the Circuit Court of Appeals for the Fourth Circuit is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance

Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

In the two *Gunther Cases*, this Court laid down the following two rules relating to the interpretation of Prohibited Articles Warranties in fire insurance policies:

(a) That where a prohibited article, such as gasoline, is kept or used upon insured premises by a tenant in violation of a Prohibited Articles Warranty, the policy is forfeited, irrespective of whether the owner of the property had "control or knowledge" of the tenant's act.

(b) That a rider or "permit" on the policy, giving permission to use a prohibited article on the premises for a certain specific purpose, does not allow its keeping or use either generally, or for an entirely different purpose.

The decision of the Circuit Court of Appeals for the Fourth Circuit in the present case is in direct conflict with both (a) and (b) above.

V.

The Circuit Court of Appeals, in approving the District Court's charge dealing with the Prohibited Articles Warranty, erroneously applied the rule of strict construction to respondent's policy and the "rider" thereon, contrary to decisions of this Court.

Since the language of the rider or "permit" was "clear and unambiguous", the Circuit Court of Appeals erred in seeking to enlarge its scope and effect by applying the rule of strict construction against the insurer:

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452;

United States Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34, at page 37.

VI.

Aside from the decisions of this Court, the construction of the "rider" as a general gasoline "permit" by the District Court and the Circuit Court of Appeals is contrary to both Federal and State Court decisions involving essentially the same facts.

In the following cases, among others, contrary conclusions were reached in construing similar "permits" on fire insurance policies:

Whitlatch v. Mutual Fire Insurance Co., decided by Supreme Court of Appeals of W. Va., on Oct. 13, 1931 (see *Appendix A*);

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Jacksonville Adjustment Bureau v. National Ben Franklin Insurance Co., 1 Fed. (2nd) 800;

Norwaysz v. Thuringia Insurance Co., 204 Ill. 334;

Vandervolgen v. Manchester Fire Insurance Co., 123 Mich. 291.

ARGUMENT.

I.

In the Absence of the "Rider" or "Permit", the Storage or Use of Gasoline in the Bachmann Building by the Tenent Varisca Would Unquestionably Have Forfeited the Policy Under the Prohibited Articles Warranty, Irrespective of Whether the Respondent Had "Control or Knowledge" Thereof; the Prohibited Articles Warranty and the Increase of Hazard Warranty Being Entirely Separate and Distinct Provisions.

In view of the fact that the Circuit Court of Appeals has laid such stress upon the "rider" added to the policy in April, 1925, we believe the proper method of approach to a determination of the effect of the "rider" upon the Prohibited Articles Warranty is to first ascertain how this Warranty would be construed in the absence of such "rider".

Since the decision of this Court in 1885, in *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, it has never been seriously questioned that under a Prohibited Articles Warranty in a fire insurance policy, the keeping or use of a prohibited article on the insured premises by a tenant forfeits the policy, whether or not the lessor of the insured building had any "control or knowledge" of the tenant's act. We quote from the opinion in that leading case delivered by Mr. Justice Matthews (116 U. S. 113, at pages 128, 129):

> *"A violation of these prohibitions by anyone permitted by the assured to occupy the premises, is a violation by the assured himself.* The Company stipulates that it will not assume the risk arising from the presence of the articles prohibited; and if they are brought upon the premises in violation of the policy by one in whose possession and control

the latter have been placed by the insured, he assumes the risk which the Company has refused to accept. In our opinion the defendant in error was chargeable with the acts of Walker if he brought upon the insured premises and stored in the oil room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises and, with the implied assent of the insured at least, was intrusted with the control and management of them. *And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequence of Walker's acts in doing that which, if done, the Company had stipulated that it would not be liable. The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself.* (Italics ours).

The principle thus laid down was adhered to by this Court on a subsequent appeal of the same case, reported in *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110; and, so far as we have been able to find, it has been followed with complete unanimity ever since by both Federal and State Courts. The following cases and texts illustrate how universally the *Gunther Cases* have been followed and cited on this proposition:

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Leonard v. Northwestern Insurance Co., 290 Fed. 318;

Bias v. Globe & Rutgers Co., 85 W. Va., 134, at 138;

Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633;
Norwaysz v. Thuringia Insurance Co., 204 Ill. 334;
German Fire Insurance Co. v. Shawnee County, 54 Kan. 732;
Badger v. Platts, 68 N. H. 222;
Swift v. Patrons Insurance Co., 125 Me. 255;
Long v. Beeber, 106 Pa. 466;
Allen v. Home Insurance Co., 133 Cal. 29;
Edwards v. Farmers Asso., 128 Ga. 353;
Kelly v. Worcester Insurance Co., 97 Mass. 284;
Duncan v. Sun Fire Insurance Co., 6 Wend. 488;
14 Ruling Case Law, 1197;
26 Corpus Juris, 221;
4 Joyce on Insurance, Sec. 2222;
4 Couch on Insurance, p. 3341.

The Circuit Court of Appeals for the Fourth Circuit does not, in so many words, profess to depart from this well-settled principle of fire insurance law; but we submit that, in effect, the Court has actually done so, because there is nothing in the so-called "rider", much stressed by the Circuit Court of Appeals, which differentiates this case from any of the other cases cited above.

As we conceive it, the fundamental error committed by both the District Court and the Circuit Court of Appeals was the failure to distinguish between the Prohibited Articles Warranty, which contains an *absolute* prohibition against the keeping of certain dangerous articles upon the insured premises (irrespective of whether the fire hazard be actually increased thereby or whether the owner of the property had control or knowledge thereof) and the Increase of Hazard War-

ranty, to establish a breach of which both of the elements last mentioned must be proven. The fact is that, though both are contained in the same policy, the Prohibited Articles Warranty and the Increase of Hazard Warranty are entirely separate and distinct. On this question, the decision of this Court in *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, is controlling. There, the fire insurance policy in question contained, among other provisions, the following two warranties (see 151 U. S. at page 453):

> (a) "This policy shall be void and of no effect if, without notice to this Company and permission therefor in writing endorsed hereon * * * the premises shall be used or occupied so as to increase the risk * * * or the risk be increased * * * by any means within the knowledge or control of the assured."
>
> (b) "This policy shall be void and of no effect if, without notice to this Company and permission therefor in writing endorsed hereon * * * if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

It appeared that the insured had employed mechanics to make repairs on the insured premises, in violation of (b), but he contended that in view of the provisions of (a), the policy would not be forfeited unless the making of the repairs actually increased the risk or hazard to the property. This Court, speaking through Mr. Justice Jackson, said at pages 463 and 464 of the opinion:

> "These terms and conditions of the policy present no ambiguity whatever. *The several conditions are separate and distinct, and wholly independent of each other. The first three of the above*

conditions depend upon an actual increase of risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not. The last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation of the condition of the policy, even though the risk might not have been, in fact, increased thereby. The condition that the policy should be void and of no effect if 'mechanics are employed in building, altering, or repairing the premises named herein', without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk." (Italics ours).

And the decision of the Supreme Court of Illinois in *Norwaysz v. Thuringia Insurance Co.*, 204 Ill. 334, is squarely in point on this proposition. We quote from the opinion, at page 339:

"Counsel for appellant cites numerous cases to the point that where there is a question whether or not the hazard was increased it is a fact to be determined by the jury. The cases undoubtedly support the doctrine, but neither the cases nor the doctrine have any application to the case under consideration. *To be sure, there was a clause in the policy which provided, 'or if the hazard be increased*

by any means within the control or knowledge of the insured,' but it is entirely separate from the clause which prohibits the keeping or use of gasoline. The paragraph begins, 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if,' and then follows a series of co-ordinate clauses, each punctuated by a semicolon. *Among these clauses are the two in question—the one prohibiting an increase of risk by any means within the knowledge or control of the insured; the other prohibiting the keeping or using of gasoline on the premises. They are entirely disassociated in fact, and there is no rule of construction that would require or suggest their connection."* (Italics ours).

And to the same effect is *Newport Improvement Co. v. Home Insurance Co.*, 163 N. Y. 237.

The erroneous conception of the Prohibited Articles Warranty formed by the District Court is illustrated by its reference, during the trial, to the following four cases (see R. 137):

Fayle v. Camden Fire Insurance Asso., 85 Mont. 248;

Colker v. Connecticut Fire Insurance Co., 218 Ky. 124;

Obermeyer v. Phoenix Insurance Co., 217 Ky. 590;

Ragley v. Insurance Co., 151 Wash. 545.

The District Court (and the Circuit Court of Appeals as well) entirely overlooked the fact that *in none of these cases was the Prohibited Articles Warranty involved,* the defense of the Insurance Company in each instance being based merely upon the allegation that moonshine stills were being operated upon the insured

premises in violation of the Increase of Hazard Warranty. Indeed, the Supreme Court of Montana, in *Fayle v. Camden Fire Insurance Association, supra,* pointed out the obvious distinction between the two warranties when it commented upon the failure of the Insurance Company in that case to show that gasoline was used in the operation of the moonshine stills found upon the premises. We quote from the opinion in the *Fayle Case*:

> *"There is no evidence to sustain the defense that gasoline or some other explosive was used to heat the still* or that the explosion resulted from any such; *nor is there any evidence tending to show that any benzine, benzole, gasoline or other explosive was kept, used, or allowed upon the premises. The provision of the policy relating to these substances (rigid in its operation) therefore has no further application to the question before us."*
>
> (Italics ours).

The two warranties being thus separate and distinct, it must be conceded that, in the absence of the "rider" added to respondent's policy in April, 1925, proof of the storage or use of gasoline in the Bachmann Building by a tenant (except possibly in so far as gasoline might be used in connection with the original permitted occupancy—the conducting of a produce store) would be sufficient to forfeit the policy, and it would not be incumbent upon petitioner, under the doctrine of *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, and the *Gunther Cases,* to show either (a) that the respondent had "control or knowledge" of the gasoline, or (b) that the presence of gasoline in the insured building actually increased the fire hazard.

We come, then, to the inquiry as to *what change the "rider" actually made in respondent's policy.*

II.

The Language of the "Rider" or "Permit"; and the Circumstances Under Which It Was Added to Respondent's Policy.

Before attempting to interpret or construe the so-called gasoline "permit", it is first necessary to determine its precise language and phraseology.

(1) *The language of the "permit".*

Both the original policy and the "rider" added in April, 1925 contained the paragraph headed "Privileges Granted"; and its language and provisions remained identically the same (R. 3, 5). The language of the original policy was changed by the "rider" in only one small particular; the words "occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous" were substituted in the Occupancy Clause in the place of the words "occupied as Produce Store". It has already been demonstrated (see "Summary of the Case", *supra*) that when the language of the rider is read together with other provisions of the policy relating to the storage and use of *gasoline* in the insured building (i. e., the Prohibited Articles Warranty, the Work and Materials Clause and the Handbook of Rules), the composite result, in condensed form, is the following:

> "The policy will be forfeited if gasoline is kept, used, or allowed on the insured premises; provided, however, that such forfeiture shall not occur if gasoline be kept and used for such purposes as are usual to the following permitted occupancies; bottling Automobile Oils, Offices, or other *Mercantile* purposes not more hazardous."

Hence, even if the "rider" be treated as a gasoline "permit", in the sense that it may have increased the number of permitted occupancies in connection with which gasoline might be used, we believe it can fairly be said that the "rider" itself, by plain and unambiguous language, provides that the storage or use of gasoline on the premises must be confined to the following purposes only:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile purposes not more hazardous.*

As we have mentioned before, the respondent apparently contends that the adjective *"Mercantile"* should be omitted from (c) above. This argument appears to be based upon the following words found in the Work and Materials Clause:

> "And for present and other occupancies not more hazardous." (R. 3).

However, in making this argument, respondent conveniently overlooks or disregards the fact that the language just quoted was in the policy from its inception, included in the paragraph headed "Privileges Granted" (R. 5). The "rider", which was added later, in describing the permitted occupancies of the insured building, used the words "other *Mercantile* purposes not more hazardous" (R. 3). Under these circumstances, we submit that, upon a fair construction of the "permit", the adjective "Mercantile" must be included as a word of limitation, and as such given its common and ordinary meaning. It hardly lies in the mouth of the respondent to urge that this adjective be omitted from the "permit" when it is expressly included in the "rider" upon which respondent bases her whole case.

Furthermore, the petitioner's contention that the adjective "Mercantile" must be read as a part of the so-called "permit" is supported by the familiar doctrine of *ejusdem generis.* As we have seen, the language of the Occupancy Clause of the "rider" is the following:

> "Occupied for bottling Automobile Oils, Offices, and *other Mercantile* purposes not more hazardous." (R. 3).

The Work and Materials Clause embodied in the "Privileges Granted" paragraph includes the following phrase:

> "And for present and other occupancies not more hazardous". (R. 3).

Hence, if there could be any doubt as to the meaning of the words "other occupancies" as used in the Work and Materials Clause, reference must be had to the nature of the occupancies *specifically* mentioned in the "rider". Under the doctrine of *ejusdem generis,* when *general* words are used in a contract after *specific* terms, the general words (in this instance, "other occupancies") will be limited and restricted in their meaning to things of like kind and nature with those specified:

> *Jones v. Island Creek Coal Co.,* 79 W. Va. 532, at 539;
> *Neal v. Clark,* 95 U. S. 709;
> *Hickman v. Cabot,* 183 Fed. 747.

In *Jones v. Island Creek Coal Company, supra,* the Supreme Court of Appeals of West Virginia construed a deed which, in addition to conveying certain minerals and mining rights, contained the following grant of an easement for the construction of tramways over the land conveyed:

> "Also with full rights of way to, from and over said premises by the construction and use of * * *

tramways * * * for the purpose of exploring, extracting, storing, handling, manufacturing, refining, shipping or transporting of said materials * * * *and for any other purpose whatsoever*". (Italics ours).

The West Virginia Court, in interpreting the effect of the italicized words in the grant of the easement, said in part at page 539 of the opinion:

"The defendant contends that it is entitled to build a tramroad over the 70¼ acres of land for any purpose whatsoever. We cannot give assent to this contention. While it may be said that this is the language of the grant we conclude that the particular enumeration of the purposes for which rights of way were granted to Buskirk by Curry were not varied or enlarged by the subsequent general clause, 'and for any other purpose whatever,' but must be confined to such purposes as are reasonably necessary to the production of the coal from such lands as may be owned and intended to be operated by the defendant in conjunction with the tract of 70¼ acres. The rule of construction in cases like this is laid down in Elliott on Contracts, sec. 1532 to be: 'The doctrine of *ejusdem generis* is applied in cases where there is a doubt as to the intention of the parties, and as a rule for the construction of contracts is stated to be that when general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature (*ejusdem generis*) with those specified."

Moreover, what this court said in *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, at page 558, is pertinent here:

"The ordinary rule in respect to the construc-

tion of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought."

Hence, in view of the several occupancies specifically mentioned in the "rider", we submit that the so-called gasoline "permit" applied only to *"Mercantile* occupancies not more hazardous"; and that permission granted thereby to store or use gasoline in the insured building was expressly limited not only to purposes "not more hazardous", but also to *"Mercantile* purposes".

However, it is unnecessary to labor the point here, for, as we shall see, the use of gasoline by the tenant to operate his moonshine stills did not fall within the terms of the "permit", whether the adjective "Mercantile" be considered as a word of limitation therein or not. We are therefore warranted in stating, as a positive fact, that the language of the "permit" allowed gasoline to be used in the Bachmann Building for the following purposes only:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile* purposes not more hazardous. (Petitioner's contention).

or

(c) *For other purposes not more hazardous.* (Respondent's contention).

(2) *The circumstances surrounding the attachment of the "rider" do not support its construction as a general gasoline "permit".*

Of course, if the clear and unambiguous language of the "rider" negatives any general "permit" allowing the use of gasoline in the insured building for *any* purpose, there is no need to take time for a consideration of the circumstances under which the "rider" was added to the policy, in aid of its interpretation. But, as a matter of fact, we find that here the extrinsic circumstances themselves are wholly inconsistent with the construction given to the "rider" by the District Court and the Circuit Court of Appeals.

It is conceded by respondent's own witnesses, as we have seen, that the "rider" was added to the policy during the time when her former tenant Huff was manufacturing automobile oils upon the premises, in order to make certain that such occupancy was permitted (R. 125, 131); that Huff used only a small quantity of gasoline as an ingredient in his manufacturing process (R. 130), and even then he was required to take certain precautions about its storage and use (R. 103, 125-6); that Huff vacated the Bachmann Building on November 1, 1925, two months before the fire (R. 126-7); and that when the fire occurred, the building was in the possession of Varisca, the Italian tenant (R. 24, 37, 39). The undisputed evidence shows that the gasoline found by the officers in the Bachmann Building at the time of the fire was being used to operate Varisca's moonshine stills. Yet, respondent does not for a moment contend that, at the time the rider was added, it was contemplated that the Bachmann Building would be used as a

moonshine liquor plant, or that gasoline would be stored and used on the premises for heating moonshine stills. On the contrary, the contention of the respondent is that she was as much surprised at the use being made of her building by the tenant as was the Insurance Company.

That evidence of surrounding circumstances may be competent to assist in the interpretation of a written contract, where there is any doubt or ambiguity in its language, is an elementary principle (*Reed v. Merchants Insurance Co.*, 95 U. S. 23); but in the present case not only is the language of the contract so clear and unambiguous as to render a consideration of extrinsic circumstances unnecessary, but even the circumstances themselves negative, rather than support, the construction given to the "rider" by the District Court and the Circuit Court of Appeals.

(3) *The scope and effect of the "permit" must be determined from its language and written provisions; there can be no modification or waiver of the Prohibited Articles Warranty by parol.*

As we have seen, at the time when petitioner's agent visited the Bachmann Building, the tenant Huff was manufacturing automobile oils on the premises. The only information then given to the agent was that "some gasoline" was being used by Huff as an ingredient in his manufacturing process (R. 125). The agent did not see any moonshine stills being operated by gasoline; he was not informed that the respondent or her tenant intended to use gasoline for such purpose; and he did not make any representation to the respondent to the effect that such use of gasoline on the premises would be permitted by the "rider". Consequently, there is absolutely no foundation in fact for any argument that the conduct of

the agent, or what he said or did, constituted an attempted waiver or modification by parol of the Prohibited Articles Warranty.

Nevertheless, we find in the opinion of the Circuit Court of Appeals the following observation:

> "At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and *it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building.*" (R. 179). (Italics ours).

We are unable to understand why the court has thus laid emphasis on the fact that "the agent of the Insurance Company saw that gasoline was being used and stored in the building", especially since what he saw had no connection whatsoever with the use of gasoline to operate moonshine stills. It would seem that the Circuit Court of Appeals may have been laboring under the impression that the Insurance Company could be bound by its local agent's knowledge or information of conditions prevailing upon or about the insured property, inconsistent with or in violation of the written provisions of the policy. If so, the Circuit Court of Appeals wholly overlooked the standard provision contained in respondent's policy providing that the written conditions and warranties of the contract can not be waived or otherwise amended by parol (see R. 8). Under repeated decisions of this Court, the effect or meaning of the Prohibited Articles Warranty, or any other written condition or provision in respondent's policy, could not be waived, eliminated, amended, or changed in any way by what petitioner's local agent may have seen when he inspected the Bachmann Build-

ing, by any information he then received, or by any verbal statements he may then have made:

Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

III.

The Use of Gasoline in the Bachman Building at the Time of the Fire as Fuel to Operate the Tenant's Moonshine Stills Was Clearly Not Within the Scope of the "Permit".

As we have seen, the only possible controversy as to the *language* of the "permit" is upon the question of whether the adjective "Mercantile" should be included or omitted. But whether this Court accepts the petitioner's or the respondent's contention on this subject, it is clear that the gasoline in the Bachmann Building when the fire occurred was being used for a purpose not covered by the terms of the "permit".

(1) *Under petitioner's interpretation of the "permit", the tenant Varisca's use of gasoline was not authorized thereby, because the manufacture of moonshine liquor, in addition to being "more hazardous", is not a "Mercantile purpose".*

The gasoline found in the Bachmann Building at the time of the fire was being used as fuel to operate the tenant Varisca's moonshine stills; there is not a scintilla of evidence in the record to the effect that the gasoline was being used for any other purpose (see R. 57-72). The method in which the gasoline was used to heat the stills was explained in detail by several witnesses (R. 57, 64, 80). In fact, the compressor tanks found with the stills were particularly designed for use with gaso-

line as fuel (R. 80). This being true, we do not see the necessity of any extended argument on the question of whether such use of gasoline on the premises fell within the terms of the "permit". Entirely aside from the question of whether this was a use "more hazardous" than in connection with "bottling Automobile Oils" or "Offices", *the illegal manufacture of moonshine liquor was clearly not a "Mercantile purpose".*

(2) *Even under respondent's interpretation of the language of the "permit", the operation of the moonshine stills constituted a "more hazardous" occupancy of the building, not covered by the "permit".*

We shall now assume, for the sake of argument, that the respondent is right in arguing that the adjective "Mercantile" was not a part of the "permit", and that the effect of the "rider" was to permit the use of gasoline for: (a) bottling Automobile Oils, (b) Offices, and (c) in connection with "other occupancies not more hazardous". Yet, the respondent must concede that the gasoline found in the Bachmann Building at the time of the fire was not being used either for (a) or (b) above; and it will be found equally clear, upon examination of the record, that (c) affords no comfort to the respondent.

It seems to us absurd to argue that the occupancy of the Bachmann Building by the tenant Varisca for the surreptitious and illegal manufacture of moonshine liquor, involving the storage and use on the premises of three 150 gallon stills, 50 or 60 barrels of alcoholic mash, and large quantities of gasoline, was "not more hazardous" than the use made of the premises by the former tenant Huff for the bottling of Automobile Oils. Huff made use of some inflammable liquids, but he was conducting a legitimate business, and it is undisputed that,

at the direction of petitioner's agent, appropriate precautions were taken by him to safeguard the materials used (R. 103, 125, 126). Huff used "some gasoline" (R. 125), but as an ingredient, not as fuel (R. 130); the fuel which he used was natural gas (R. 129). At the trial, the witness Morris, Professor of Chemistry at West Virginia University, testified as to the dangers incident to the distillation of alcoholic products (R. 81). In addition, the petitioner offered testimony by Professor Morris to the effect that the use of gasoline as fuel was considerably *more hazardous* than the use of natural gas (R. 135-6); but upon the objections of the respondent, such testimony was excluded by the trial court. If it was incumbent upon the petitioner to show that Varisca's occupancy of the Bachmann Building was "more hazardous" than Huff's, then this testimony was clearly competent and admissible, and petitioner is entitled to the benefit thereof on this appeal (see *Truschel v. Rex Amusement Co.*, 102 W. Va. 215).

Unfortunately for respondent, it has been consistently held by the courts that the occupancy of an insured building for the purpose of manufacturing moonshine liquor, and the presence on the insured premises of moonshine stills and the usual equipment and materials used in connection therewith, create an *increased fire hazard thereto.* In *Miller v. Union Assurance Society*, 39 Fed. (2nd) 25, at page 29, the Circuit Court of Appeals for the Eighth Circuit said:

> "It was provided by the policy that it should become void (a) 'if the hazard be increased by any means within the control or knowledge of the insured'. *This provision stands alone and separate from the other provisions of the policy.* According to the evidence, the hazard was greatly increased by means which were within the knowledge and con-

trol of the insured. *Large quantities of gasoline were kept and stored in said premises for use in connection with the illegal manufacture of alcohol.* Moreover, according to the evidence, alcohol itself is an explosive substance. *It would be idle to say that the hazard of said premises was not increased by the installation and operation of distilling apparatuses in accordance with the methods and means shown to have been employed in this case. All the evidence points conclusively to that fact."* (Italics ours).

In such a situation, it is not a question for the jury whether the occupancy was "more hazardous"; the courts hold that the hazard is thereby increased *as a matter of law.* In *Taverna v. Palatine Insurance Co.*, 238 N. Y. S. 389, the New York Court said at page 391:

"While, as a general rule, the question of whether a risk or hazard has been increased is one of fact, there are conditions and situations which make it a question for the court rather than the jury. *We think that, under the facts in this case, the learned court below was correct in holding that, as a matter of law, the setting up of the stills and the storing of the alcohol in the building increased the hazard."* (Italics ours).

In the very recent case of *Schaffer v. Hampton Insurance Co.*, 235 N. W. 618, the Supreme Court of Minnesota said:

"The first question was submitted to the jury as the only issue in the case; the charge being that, if they found that the installation and operation of the distilling apparatus increased the fire risk, it avoided the policy, and entitled defendant to a verdict. *Defendant contends that, as a matter of law, the risk was increased.* Ordinarily, the question is

for a jury. But the evidence here is uncontradicted that an illicit distillery was carried on in the Westerly barn * * * *we are compelled to hold that the installation and operation of a still in a farm barn not located or constructed with a view safely to carry on such business exposes the premises insured to increased risk from fire.*" (Italics ours).

In a supplemental opinion on a rehearing of the case, reported in 236 N. W. 327, the Minnesota Court said:

> "Defendant proved conclusively that a still was operated in the smaller barn, and *we held, and still hold, that such operation as a matter of law increased the risk from fire.*" (Italics ours).

The same conclusion was reached by the Supreme Court of Appeals of West Virginia in the very recent case of *Whitlatch v. Mutual Fire Insurance Co.*, decided on October 13, 1931. As the opinion of the West Virginia court is not yet available in the reports, it is copied in *Appendix A* to this brief.

In the *Whitlatch Case*, the insured had been using natural gas in a secret compartment adjoining his barn for the purpose of heating a moonshine still. The West Virginia court said, in part, as follows:

> "Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, *we must nevertheless hold, as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose Slat made of the room.*" (Italics ours).

Nor is this all. If Varisca's occupancy of the Bachmann Building was not "more hazardous" than Huff's *as a matter of law*, as we conceive it to have been under

the authorities above cited, then the question was one of *fact* for the jury. In such event, it would be the duty of the District Court to charge the jury that it should return a verdict for the petitioner, if it believed that the use of the insured building by Varisca was "more hazardous" than Huff's use thereof. *This the District Court did not do.* As we have seen, the only question submitted to the jury by the District Court was whether respondent had "control or knowledge" of Varisca's use of the building (as typical of the charge, see Plaintiff's Instructions Nos. 4 and 10, R. 144, 147). Respondent is, therefore, in no position to complain that the petitioner did not prove a "more hazardous" use of the insured building or of the gasoline found thereon, when she herself, in her own instructions incorporated in the District Court's charge, did not submit this question to the jury.

Consequently, whether the language of the permit was, as petitioner contends, merely to allow the use of gasoline on the premises for "other *Mercantile* purposes not more hazardous," or, as respondent argues, for "other occupancies not more hazardous," the fact remains that Varisca's use of gasoline in the Bachmann Building to operate his moonshine stills *was not within the terms of the "permit" at all;* and this whole case can be summarized as follows:

1. The policy contains a warranty expressly prohibiting the storage or use of gasoline in the Bachmann Building.

2. This warranty is modified by a "rider" or "permit", the effect of which is to allow the use of gasoline in the building for certain specific purposes.

3. The use being made of gasoline in the Bachmann Building by the tenant Varisca at the time of

the fire—*i. e.*, to operate his moonshine stills—was not within the terms of the "permit."

We submit, therefore, that this case falls squarely within the decisions of this Court in the *Gunther Cases*, to a discussion and analysis of which we now advert.

IV.

The Use of Gasoline to Operate Moonshine Stills Not Being Within the Terms of the "Permit" on Respondent's Policy, the Decision of the Circuit Court of Appeals for the Fourth Circuit Is in Direct Conflict With the Decisions of This Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

The recognized leading cases upon the subject of the construction and effect of a Prohibited Articles Warranty in a fire insurance policy, and the effect of a rider or "permit" modifying such warranty, are *Liverpool & London & Globe Insurance Co. v. Gunther*, 116 U. S. 113, and *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110. Both of these decisions were handed down in the same cause, which was twice appealed to this Court.

The judgment recovered by Gunther upon his fire insurance policy in the first trial of the case was reversed by this Court in December, 1885 (116 U. S. 113). Upon the second trial, a verdict was returned for the plaintiff, but this was set aside by the trial court (34 Fed. 501). Upon the third trial, the lower court directed a verdict in favor of the Insurance Company, and the judgment was affirmed by this Court in March, 1890, upon the second appeal (134 U. S. 110).

The Facts in the Gunther Cases.

In order to demonstrate the applicability of these two decisions to the present case, we shall briefly state the facts as they are related in the two opinions of this court.

The policy issued to Gunther described the insured building and the occupancy thereof as follows:

> "The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

A Prohibited Articles Warranty in the following language was contained in the policy:

> "Petroleum * * * benzine * * * naphtha * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * * otherwise this policy shall be null and void." (134 U. S. at 111).

The above warranty was modified by the following "permit" on the policy:

> "Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

The insured property, a hotel building, was owned by Gunther, but at the time of the fire, which occurred in August, 1879, was being occupied by a tenant, one Walker. For a period of about eleven years, gasoline

had been used in the gasometer described in the permit for the purpose of furnishing light for the hotel building, but the use of this apparatus had been discontinued in the Fall of 1878, about a year prior to the fire. Evidence was adduced at the trial tending to show that at the time of the fire gasoline was being kept by the tenant Walker in the oil room of the hotel *for some purpose other than the operation of the gasometer.* As to the particular use being made of this gasoline by the tenant, Mr. Justice Matthews said (116 U. S. 118):

> "There was evidence tending to show that gasoline, benzine or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic."

Gunther had no knowledge whatsoever of the gasoline being kept by his tenant.

The Rulings of Law in the Gunther Cases.

The following two important principles of law relating to the interpretation and effect of Prohibited Articles Warranties in fire insurance policies were laid down by this Court in the *Gunther Cases*:

(a) *That where a prohibited article, such as gasoline, is kept or used upon insured premises by a tenant in violation of a Prohibited Articles Warranty in the policy, the contract is forfeited, irrespective of whether the owner of the property had "control or knowledge" of the tenant's violation.* On the first appeal this Court said, in part, at pages 128-9 of 116 U. S.:—

> *"A violation of these prohibitions by anyone permitted by the assured to occupy the premises is a violation by the assured himself.* The Company stipulates that it will not assume the risks arising

from the presence of the articles prohibited; and if they are brought on the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the Company has refused to accept * * * *the insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another, the latter became his representative, for whom he must answer as for himself.*" (Italics ours).

And on the second appeal, Mr. Justice Gray, in delivering the opinion of this Court, said in part as follows, at pages 115-116 of 134 U. S.:—

"It has also been decided that a breach of the conditions by any person permitted by the assured to occupy the premises was equivalent to a breach by the assured himself; and that the assured was chargeable with any acts of his lessee in keeping upon the premises any of the prohibited articles, although they were not intended to be used there, but for lighting other places."

(b) *That a rider or "permit" on the policy, giving permission to use a prohibited article on the premises for a certain specific purpose, does not allow its keeping or use either generally, or for an entirely different purpose.*

Upon the first appeal, Mr. Justice Matthews, speaking for this court, said at pages 130 and 131 of 116 U. S.:

"The circuit court also erred in the charge to the jury that under the circumstances disclosed by the evidence it was no breach of the conditions of the policy to have in the oil room a quantity of

gasoline although not intended for use in the gas apparatus, the use of which had in fact been discontinued if the oil room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

"* * * it is clear that the privilege indorsed on the policy, in the following terms: 'To use gasoline gas—gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process', *did not sanction the keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus.* There is no express permission to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. *Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privelege granted.* * * *"

"It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and in doing so would have been justified in obtaining, keeping, storing and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. *But if the privilege itself is not actually exercised, no such implication arises and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually ex-*

ercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time." (Italics ours).

And we quote from the opinion delivered by Mr. Justice Gray on the second appeal (134 U. S., at page 115):

"The clause following the description of the buildings in each policy, 'Privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process', does not affect the case; *for the use of the gas apparatus had been discontinued some time before the fire; and, as has already been decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus.* 116 U. S. 130 (29:581)." (Italics ours).

In order that the conflict between the decisions in the *Gunther Cases* and the opinion of the majority of the Circuit Court of Appeals in the present case may be clearly visualized and understood, we have undertaken to make below a detailed comparison thereof, in opposite columns:

Comparison Between Facts and Rulings of Law in Gunther and Bachmann Cases.

GUNTHER CASES	BACHMANN CASE
1. *Prohibited Articles Warranty*:	1. *Prohibited Articles Warranty*:
"Petroleum * * * gasoline * * * or any other inflammable liquid are not	"Unless otherwise provided by agreement in writing added hereto, this

to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * *; otherwise this policy shall be null and void." (134 U. S. at 111.)

2. *The Occupancy Clause*:

"The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

3. *The Gasoline Permit*:

"Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

Company shall not be liable for loss or damage occurring * * * (d) while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline * * *" (R. 6-7).

2. *The Occupancy Clause, as Amended by Rider*:

"$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous." (R. 3).

3. *The Gasoline Permit*:

(being the composite result of the amended Occupancy Clause embraced in the rider and the Work and Materials Clause as interpreted by the Handbook of Rules):

"Occupied for bottling

Automobile Oils, Offices and other Mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed conditions of the policy permitted *when kept and used for such purposes as are usual to the occupancies permitted.*"

4. *Use of Gasoline when Permit Attached.*

At the time the permit was placed on the policy, gasoline was being used in the gasometer apparatus for the purpose of lighting the insured building.

4. *Use of Gasoline when Permit Attached.*

At the time of the attachment of the rider or permit, small quantities of gasoline were being used by the tenant Huff as an ingredient in the manufacture of automobile oils.

5. *Use of Gasoline at Time of Fire.*

The gasoline stored in the oil room of the insured hotel at the time of the fire was not being used in connection with the gasometer apparatus mentioned in the permit, but either in torches for lighting a pavilion or for lighting certain picnic grounds some

5. *Use of Gasoline at Time of Fire.*

The gasoline found in the Bachmann Building at the time of the fire was being used by the tenant Varisca to operate three large moonshine stills.

distance away. (See 116 U. S. 118).

6. *Owner's Control or Knowledge of Gasoline.*

Gunther, the owner of the property, had no knowledge that his tenant, Walker, was keeping the gasoline on the premises.

7. *Holding of this Court.*

(a) That the permit did not eliminate gasoline from the Prohibited Articles Warranty, unless it was being used for the purpose specified in the permit. This court said, in part (116 U. S. 131):

"If the privilege itself is not actually exercised, no such implication arises; and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor in-

6. *Owner's Control or Knowledge of Gasoline.*

The Jury found that respondent had no knowledge of the gasoline being kept on the premises by her tenant Varisca.

7. *Holding of majority of Circuit Court of Appeals.*

(a) That the rider, being construed as a "permit", eliminated gasoline altogether from the Prohibited Articles Warranty, irrespective of the use being made thereof. We quote from the majority opinion:

"It was contended on the trial below that *this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty* * * *. The trial court took this view of the case, and we think prop-

tended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline in any quantity, in any place, or for any time." (Italics ours).

erly so." (Italics ours). (R. 179).

(b) That Gunther was bound by the act of his tenant in keeping gasoline upon the premises, for a purpose not included within the permit, irrespective of whether Gunther had control or knowledge thereof. This court said, in part (116 U. S. 129):

"The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself." (Italics ours).

(b) That after the rider or "permit" was attached, gasoline came under the Increase of Hazard Warranty—that is, the tenant might keep or use gasoline upon the premises for any purpose, provided respondent had no knowledge or control thereof. (R. 179).

We submit that this graphic comparison plainly demonstrates that the majority opinion in the *Bachmann Case* is absolutely in conflict with the principles laid down by this court in the *Gunther Cases.*

V.

The Circuit Court of Appeals, in Approving the District Court's Charge Dealing With the Prohibited Articles Warranty, Erroneously Applied the Rule of Strict Construction to Respondent's Policy and the "Rider" Thereon, Contrary to Decisions of this Court.

In the first part of its opinion dealing with the portion of the District Court's charge which submitted to the jury petitioner's defense under the Increase of Hazard Warranty, the Circuit Court of Appeals cited the well-established rule that where there is any ambiguity or doubt in the meaning of an insurance policy, the contract will be construed most strongly against the Insurance Company (R. 178). It is apparent that in construing the "rider" as a general gasoline "permit," the Circuit Court of Appeals must have applied the same rule of strict construction.

The propriety of the application of the rule of strict construction to an insurance contract, where the facts warrant the invoking of such rule, is unquestioned. In the present case, however, as we have seen, respondent's policy contained in the Prohibited Articles Warranty an *absolute* prohibition against the keeping or using of gasoline in the insured building. By the "rider," this Warranty was modified only to the extent of the following language:

> "Occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous. (R. 3).
>
> *"Gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted when kept and used for such purposes as are usual to the occupancies permitted."* (R. 89).

This language admits of no doubt or ambiguity. The right to store or use gasoline is limited to certain definite purposes. The Circuit Court of Appeals, in attempting to uphold the District Court's charge, was therefore not justified in invoking a rule of construction which this Court has held must not be applied where the language of the contract is "clear and unambiguous."

In the leading case of *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, Mr. Justice Jackson, speaking for this Court, stated the rule as follows at page 462 of the opinion:

> "It is settled * * * that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. *But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*" (Italics ours).

The rule of construction thus laid down has been consistently followed and applied by both the Federal and State Courts. The foregoing statement of the rule by Mr. Justice Jackson was recently quoted again with approval by this Court in *United States Fidelity & Guaranty Co. v. Guenther*, 281 U. S. 34, at p. 37.

There could be cited here an endless number of cases, both Federal and State, in which the same rule of construction for insurance contracts has been approved

and applied, but in view of the pronouncements of this Court upon the subject, we deem it unnecessary to prolong this brief with such citations.

It is submitted, therefore, that in construing the "rider" attached to respondent's policy, both the District Court and the Circuit Court of Appeals adopted the wrong method of approach; and that in the light of the "clear and unambiguous" language of the "rider," there was no place here for the application of the rule of strict construction.

VI.

Aside From the Decisions of This Court, the Construction of the "Rider" as a General Gasoline "Permit" by the District Court and the Circuit Court of Appeals is Contrary to Both Federal and State Court Decisions Involving Essentially the Same Facts.

We have attempted to demonstrate that the decision of the Circuit Court of Appeals is in direct conflict with the *Gunther Cases* decided by this Court. The same conflict exists with various Federal and State Court decisions, to some of which we shall briefly refer.

(a) *Whitlatch v. Mutual Fire Insurance Co.,* (decided by the Supreme Court of Appeals of West Virginia on October 13, 1931).

As this very recent case is not yet available in the reports, we have copied the opinion of the West Virginia court in *Appendix A* to this brief.

In the *Whitlatch Case,* the insured had constructed a secret compartment enclosed by solid concrete walls, adjacent to the foundation of his barn. In this compartment the insured had equipment and materials which quite obviously made up a moonshine still plant.

The still was heated by natural gas, through a hot plate. A gas explosion originating within the compartment completely wrecking it, killed the insured, and started a fire which destroyed the barn. The policy of insurance sued upon insured both the barn and a nearby dwelling house.

The policy contained the standard Increase of Hazard Warranty and an additional provision, analogous to a Prohibited Articles Warranty, which absolutely prohibited "the use of fire heat" in or about the barn. The Insurance Company contended that the policy was forfeited because the operation of a moonshine still plant by natural gas constituted an increase of hazard *as a matter of law*. On the other hand, the plaintiff contended that since the explosion and fire resulted from the use of natural gas within the compartment, the policy was not forfeited, it being asserted by the plaintiff that the Increase of Hazard Warranty and the additional warranty prohibiting "fire heat" had been eliminated or modified, in so far as natural gas was concerned, by the following "permit" which was attached to the policy:

> "Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions: This Company will not be liable for damages by explosion of Natural Gas on the premises unless fire ensues, and then for damages by fire only. CAUTION: The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stovepipe provided with dampers to prevent overheating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose

key to be hung up out of reach of children. BEWARE OF LEAKS IN PIPES." (See Appendix A).

The Supreme Court of Appeals of West Virginia refused to construe the natural gas permit as contended for by the plaintiff, and in its opinion *referred to the decision of this Court in Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113. We quote from the opinion of the West Virginia Court:

> "The defendant replies that the use of gas allowed by the permit was use in the "accustomed manner" with the usual safeguard and not a use which is extraordinary, citing *Ins. Co. v. Gunther,* 116 U. S. 113, 130-1; and defendant contends that the character of the articles found in the room in connection with its inaccessibility and its secrecy, demonstrate that Slat was using it to manufacture moonshine liquor. * * * The facts that the room had no ventilation, and that gas was being conducted through the rubber hose (with its natural tendency to leakage) *show a use which was unusual and not contemplated by the insurer in granting the gas permit. Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, we must nevertheless hold as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose Slat made of the room;* and that an instruction to find for defendant (requested) should have been given." (See Appendix A). (Italics ours).

(b) *Miller v. Union Assurance Society, 39 Fed. (2nd) 25.*

Here, the Circuit Court of Appeals for the Eighth Circuit had before it a case very similar to the present

one on the facts. An Italian tenant of the policyholder was, at the time of the fire, storing and using gasoline on the insured premises for the purpose of operating his moonshine stills. The Circuit Court of Appeals held that the tenant's act violated the Prohibited Articles Warranty and forfeited the policy. We quote from page 29 of the opinion:

> "It was further provided that said policies should become void 'if there be kept, used or allowed' on said premises gasoline or other explosives. Undeniably large quantities of gasoline and alcohol were kept and used on said premises by Armeno. Such articles were used in connection with the unlawful manufacture of alcoholic spirits. This was a violation of the contracts and warranted the appellee in declaring them void. *La Force v. Williams City Ins. Co.*, 43 Mos. App. 519; *Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575; *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857; *Leonard v. Northwestern Nat. Ins. Co.*, 53 App. D. C. 343, 290 F. 318."

It was contended in the *Miller case*, as respondent does here, that the Work and Materials Clause in the policy permitted the storage and use of gasoline on the insured premises. The Work and Materials Clause in Miller's policy gave him the right to use the premises, "as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law" (see 39 Fed. (2nd), at page 30).

The "business conducted therein" at the time Miller's policy was written was "the manufacture of water fillers, oil burners, ice can fillers, and other small appliances" (see 39 Fed. (2nd), at page 29).

Bearing in mind that the rider or "permit" was attached to respondent's policy when the Bachmann Building was being used by the former tenant Huff for the legitimate manufacture of automobile oils, the following extracts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* are peculiarly pertinent to the case at bar:

> "It is contended by the appellant that the policies themselves contain no provision relative to the use of said premises. When the policies were written, the premises were occupied by the E. L. Miller Manufacturing Company. This company was engaged in the manufacture of water fillers, oil burners, ice can fillers, and other small appliances. Both parties knew the nature and hazards of this occupancy. It was unnecessary to stipulate in the contract the nature of the occupancy and the hazards thereof when both were well known to the contracting parties." (39 Fed. (2nd), p. 29).
>
> "Neither can the storing and use of gasoline and alcohol on said premises be excused or justified under the so-called work and materials clause of the policies. This provision reserves to the occupant the right to use 'the premises as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law'.
>
> "Obviously and admittedly the materials in question were used in violation of law as the premises were being used not only to violate the prohibitory laws of the government but the revenue laws as well." (39 Fed. (2nd) p. 30).

While the Work and Materials Clause in respondent's policy did not contain the words "when not in violation of any law", it did embody, as we have seen, a limitation no less plain and definite, i. e., that the gaso-

line used on the premises must be "kept and used for such purposes as are usual to the occupancies permitted" (R. 89). It seems obvious, therefore, that the decisions of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* and of the Circuit Court of Appeals for the Fourth Circuit in the *Bachmann case*, involving substantially the same set of facts, are in hopeless conflict.

(c) *Jacksonville Adjustment Bureau v. National Ben Franklin Insurance Co., 1 Fed. (2nd) 800.*

In this case, it appeared that fireworks were being kept in the insured building at the time of the fire. The standard Prohibited Articles Warranty contains the same prohibition against fireworks as it does against gasoline (R. 7). The insured sought to have fireworks eliminated from the Prohibited Articles Warranty, because gunpowder was permitted by the policy to be kept on the premises, and it was shown that the fireworks were made of gunpowder. But the Court (Southern District of Florida) dealt with this argument as follows, at page 801:—

> "The fifth replication undertakes to justify the keeping of fireworks because the policy permitted gunpowder to be kept in stock. *The policy contains the absolute inhibition against keeping fireworks in stock; and, as announced by the Supreme Court, insurance policies are construed like any other written contract between parties. If the meaning of the words used is plain, and no fraud or mistake in the case, there is no room for construction. They must be given their plain meaning.* Fireworks are prohibited; gunpowder is allowed. It will not do to say that, because fireworks have

gunpowder in them, fireworks may be kept in stock where the policy forbids it." (Italics ours).

It was further contended by the insured that the occupancy clause of the policy should be construed so as to permit the keeping of fireworks, notwithstanding the Prohibited Articles Warranty, but the court replied to that argument thus, at page 801:

> "The contention of plaintiff that the typewritten words in the policy, 'Dry goods, ready to wear clothing, boots, shoes, clothing, groceries, hardware', followed by the printed words, 'and such other merchandise not more hazardous usual to his trade', authorizes the keeping of fireworks, is not tenable. Nor can a custom of the trade be shown to contradict the provisions of the policy. There is no ambiguity to be explained."

(d) *Norwayss v. Thuringia Insurance Co.*, 204 Ill. 334.

In this case, the policy in question contained the standard Increase of Hazard and Prohibited Articles Warranties. There was also attached to the policy a rider containing a gasoline "permit" in the language following:

> "Permission is hereby given for the use of gasoline stoves, the reservoir to be filled by daylight only and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons, to be in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto." (See 204 Ill., 337).

The evidence showed that at the time of the fire, the insured's tenant was keeping a gallon can of gasoline in the pantry, in addition to the gasoline permitted by the rider to be contained in the reservoir in the stove. In holding that this constituted a violation of the Prohibited Articles Warranty, notwithstanding the "permit" on the policy, the Supreme Court of Illinois said at page 342:

> *"The permission given to the insured to use gasoline does not relieve him from the effect of the violation of the one important restriction on such use.* The insurance company was not compelled to give its permission to the appellant to use gasoline. It was a voluntary act for the benefit of the insured, and there was no advantage to the insurance company gained thereby. Contracts of insurance are to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer, and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having been made, is not actually or inferentially waived, it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion. *In the case at bar there was permission given to use a gasoline stove, and on the permit were the words, 'Warranted by the assured that no artificial lights be permitted in the room when the reservoir is being filled, and no gasoline except that contained in*

said reservoir shall be kept within the building.' The undisputed evidence is that gasoline was kept by the tenant of the insured in the building." (Italics ours).

And later, in the same opinion, at page 345, the Illinois Court said:

"If we were to consider this 'rider' as a contract, there is on one side a permission to use a gasoline stove; on the other side, standing as a consideration for the permission, a warranty that in using the stove no gasoline other than that in the reservoir shall be kept in the building."

(e) *Vandervolgen v. Manchester Fire Insurance Co.*, 123 Mich. 291.

The policy in this case contained a Prohibited Articles Warranty which forbade the keeping of kerosene oil on the insured premises in quantities exceeding five barrels, with the following proviso:

"Provided, it (the kerosene) be drawn and lamps filled by daylight, or at a distance of not less than ten feet from artificial light."

It appeared from the evidence that the insured had attempted to draw kerosene oil from the tank kept in the insured building in a manner different from that specified in the provision quoted above.

In denying a recovery on the policy, the Supreme Court of Michigan, speaking through Chief Justice Montgomery, said in part as follows at pages 293-295 of 123 Mich:

"Plaintiff contends that the clause in question by its terms applies when it is not otherwise provided by agreement indorsed on the policy, and that by the written portion of the policy it is made

to cover oils and such other goods as are usually kept in a hardware store, etc., and that this is a provision otherwise than in the written clause. * * * The defendants contend, however, that this line of cases does not meet the question here involved, for it is said the written portion of the policy itself permits the keeping and sale of kerosene, but that what is provided against is that kerosene shall be drawn in the nighttime within a specified distance from an artificial light; that this provision is entirely consistent with the fact that the insurance covers kerosene. This view seems entirely sound, and was sanctioned in *Gunther v. Insurance Co.* (C. C.) 34 Fed. 501. * * * By the parenthetic clause in this policy the use for lighting purposes or keeping for sale is not prohibited, but it is provided that the oil be drawn by daylight, or not less than 10 feet from artificial light. *This language is plain and unambiguous. We cannot doubt that it was intended to and should be construed as providing a forfeiture for the drawing of kerosene in any other manner than that provided.*" (Italics ours).

Many other cases might be cited, but we believe the foregoing discussion is sufficient to demonstrate that not only is the decision of the Circuit Court of Appeals, in construing the "rider" attached to respondent's policy as a "permit" allowing the use of gasoline generally, in direct conflict with decisions of this Court, but it is likewise out of harmony with the conclusions reached in many Federal and State cases in which the facts involved were essentially the same.

Conclusion.

From the clear and unambiguous language of respondent's policy and the "rider" attached thereto, from the undisputed extrinsic circumstances surrounding the addition of the "rider", and from the foregoing discussion of legal principles and authorities, we submit that the Circuit Court of Appeals erred in construing the "rider" as a general gasoline "permit" which eliminated this article entirely from the Prohibited Articles Warranty. In line with the principles laid down in the *Gunther Cases*, we submit that the District Court should have given to the jury, as was requested by petitioner at the trial (see R. 148-50), a simple and direct charge to the effect that if gasoline was being kept or used in the Bachmann Building by the tenant Varisca for the purpose of operating moonshine stills, the policy was forfeited, irrespective of respondent's "control or knowledge" thereof. As actually given, the District Court's charge deprived petitioner entirely of its defense under the Prohibited Articles Warranty, and in view of the overwhelming proof that the moonshine stills found in the Bachmann Building were being operated by gasoline, it is obvious that the petitioner has not had a fair trial.

It was pointed out in our petition for certiorari that this case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the States. In at least twenty-five States, the so-called "New York Standard Policy" has been adopted by statute. A list of these States, together with a reference to their standard policy statutes, will be found in *Appendix B* to this brief. It is also common knowledge,

and we believe this Court can take judicial knowledge of the fact, that in practically all of the forty-eight States the "New York Standard Policy" is used in insuring property against loss by fire, whether actually prescribed by statute or not.

Since by statute and by custom the language of the Prohibited Articles Warranty in fire insurance policies has become standardized, and its use is so universal, a precedent should not now be set for the complete emasculation of the Warranty by a "rider" or "permit" which was never intended by the parties to have, and by its plain language does not have, such effect.

* * * * * * * * *

For the foregoing reasons, it is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Northern District of West Virginia, should be reversed.

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APPENDIX A.

The following opinion was handed down by the Supreme Court of Appeals of West Virginia on October 13, 1931:

L. N. Whitlatch, Admr.

v.

Mutual Fire Insurance Company of W. Va.

Marion County — Reversed and Remanded

HATCHER, Judge.

Permission in a fire insurance policy to use natural gas in a barn for light and fuel implies use of the gas in the customary way; and where the gas is used by the insured in a manner and under conditions which are unusual and which increased the hazard assumed by the insurer, such use avoids the policy under a warranty so providing.

HATCHER, Judge:

This is an action to recover insurance on a barn and farming implements destroyed by fire. The insurance company denied liability on the ground that the assured had violated certain warranties in the policy. The plaintiff obtained a judgment for $1,000 and the defendant secured a writ of error.

The following facts were established at the trial: Tom Slat held a three year policy issued May 26, 1926, by defendant which covered the loss. About 7 a. m. Sunday, January 22, 1928, the attention of his family and close neighbors was attracted to the barn by an explosion followed by a fire (which destroyed it). Hurrying to the fire they found his dead body in a covert chamber adjoining a foundation wall of the barn. This compartment was approximately 20x10x6, and con-

tained one entrance (only), through a trap door, two to three feet square in the wall of the barn. The floor, walls and ceiling of the room were constructed of concrete; the walls and ceiling were six inches thick (some witnesses said more) and the ceiling was reinforced with steel rails and cables. There was a pig pen above the structure. The explosion burst open the ceiling of the room and set fire to the pen and the barn. The compartment contained (a) a water line, (b) a gas line with an open burner, and a connection to which was attached a rubber hose about four feet long, (c) a gas hot plate made of ¾ inch piping ("run backward and forward" four or five times, into which holes had been drilled to permit the escape of gas), (d) a 20 gallon keg with a small round hole in the side near the bottom, and (e) a wooden tank with a capacity of four to five hundred gallons, which contained a mixture of cracked corn and water. Several members of Slat's family were witnesses and they denied any knowledge of the compartment. It was unknown to all his neighbors who testified, except one, who helped Slat construct part of it about 1920.

The warranties in the policy which the defendant claims were violated are as follows:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured * * * .
>
> The use of fire heat in any barn, * * * or other outbuilding insured or containing property insured by this policy, or exposing property insured hereby, without written permission hereon, renders this entire policy void."

The plaintiff contends that the gas was used in the secret room for fuel and light and such use was permissible, under the following permit in writing attached to the policy:

> "Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions: This Company will not be liable for damages by explosion of Natural Gas on the premises unless fire ensues, and then for damages by fire only. CAUTION: The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stovepipe provided with darapers to prevent overheating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose key to be hung up out of reach of children. BEWARE OF LEAKS IN PIPES."

The defendant replies that the use of gas allowed by the permit was use in the "accustomed manner" with the usual safeguard and not a use which is extraordinary, citing *Ins. Co. v. Gunther*, 116 U. S. 113, 130-1; and the defendant contends that the character of the articles found in the room in connection with its inaccessibility and its secrecy, demonstrate that Slat was using it to manufacture moonshine liquor. The plaintiff answers that the contention fails because no boiler and coil were found, both of which are necessary in such an operation. The facts that the room had no ventilation, and that gas was being conducted through the rubber hose (with its natural tendency to leakage) show a use which was unusual and not contemplated by the insurer in granting the gas permit. Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, we must nevertheless hold

as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose that made of the room; and that an instruction to find for defendant (requested) should have been given. See generally *Appleby v. Ins. Co.*, 54 N. Y. 253; *Schaffer v. Ins. Co.*, (Minn.) 235 N. W. 618. This determination renders a discussion of other points of error unnecessary.

The judgment of the lower court is reversed, the verdict of the jury set aside, and the case remanded.

Reversed and Remanded.

APPENDIX B.

In the States listed below, the New York Standard Fire Insurance Policy has been adopted by statute:

Arizona, Laws of 1913, Ch. 94, Sec. 56;
California, Laws of 1909, p. 404;
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075;
Idaho, Laws of 1913, Ch. 185, Sec. 13;
Iowa, Code of 1927, Secs. 9017 and 9018;
Louisiana, Laws of 1914, p. 493;
Maine, Revised Statutes, Ch. 49, Sec. 4;
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99;
Michigan, Laws of 1917, No. 256, Sec. 243;
Minnesota, Laws of 1923, Ch. 410;
Nebraska, Revised Statutes of 1913, Sec. 3237;
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1;
New Jersey, P. L. of 1902, p. 437;
New Mexico, Laws of 1925, Ch. 135, Sec. 66;
New York, Laws of 1922, Ch. 268;

North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10;
Oklahoma, Laws of 1909, pp. 348 to 350;
Oregon, Laws of 1917, Ch. 203, Sec. 22-H;
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2;
Rhode Island, P. L. 1921, Ch. 2094;
South Dakota, Laws of 1909, Ch. 164, Secs. 1 and 2;
Virginia, Laws of 1928, pp. 763-766;
Washington, Laws of 1915, p. 598, Sec. 12;
West Virginia, Laws of 1923, Ch. 18;
Wisconsin, Laws of 1923, Ch. 291, Sec. 3.